

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14**

**Flint Hills Rural Electric Cooperative  
Association, Inc.**

**Employer**

**and**

**Case 14-RC-269760**

**International Brotherhood of Electrical  
Workers, Local 304**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Flint Hills Rural Electric Cooperative Association, Inc. (“Employer”) operates an electric cooperative in central Kansas. International Brotherhood of Electrical Workers, Local 304 (“Petitioner”) filed the instant petition with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”), seeking to add the two unrepresented construction foremen (“CFs”) employed by the Employer to an existing bargaining unit consisting of all production and maintenance employees.<sup>1</sup>

A hearing was held on January 7 and 8, 2021,<sup>2</sup> before a hearing officer of the Board. The parties were permitted to state their positions and filed post-hearing briefs.

The only issue<sup>3</sup> raised by the Employer is the supervisory status of the petitioned-for CFs. The Employer maintains that the CF position is supervisory as defined in Section 2(11) of the Act while Petitioner contends that the CFs are employees under the Act, who do not use independent judgment or effectively recommend actions of a supervisory nature. Specifically, the Employer argues the CFs hire, transfer, discipline, promote and reward employees, assign and responsibly direct work, and adjust employee grievances using independent judgment.

At the hearing, the parties stipulated that any election should be conducted by mail balloting.

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<sup>1</sup> As certified, the bargaining unit is described as:

All production and maintenance employees of the employer but excluding guards, office clerical employees and supervisors as defined in the Act.

In the parties’ current collective-bargaining agreement, the unit is described as:

All employees, excluding office and office clerical employees and professional employees, supervisory employees and guards, as defined in the Labor-Management Relations Act.

<sup>2</sup> All dates are in 2021 unless indicated otherwise.

<sup>3</sup> Neither party disputed the CFs are an identifiable, distinct segment of the workforce that shares a community of interest with the existing unit.

As explained below, based on the record, the briefs, and relevant Board law, I find that the petitioned-for individuals are an identifiable distinct group that shares a community of interest with the existing unit and the Employer failed to meet its burden to establish the construction foremen are supervisors under Section 2(11) of the Act.

## **I. THE EMPLOYER'S OPERATION**

The Employer operates an electric cooperative serving approximately 6600 members and meters across about 10 counties in rural Kansas. The Employer has two primary facilities—an administrative building with attached warehouse in Council Grove, Kansas, and a warehouse in Hillsboro, Kansas—along with about 2500 miles of distribution and transmission lines. The warehouses provide storage for company vehicles and a limited amount of building materials and a place for employees to complete paperwork associated with their positions.

As a cooperative, the Employer is owned by its members and governed by an 8-person board. Its day-to-day operations are overseen by General Manager Charles “Chuck” Goeckel, who manages three department heads: Member Services Manager Travis Griffin, Accounting Supervisor and Human Resource Specialist Jodi Blackburn, and Operations Manager James Blue.

Operations Manager Blue is in charge of all the maintenance and operations for the Employer’s electrical power plant which involves, among other things, running electrical lines for new builds and attaching new cooperative members to the Employer’s network, maintaining the Employer’s existing network and rebuilding electrical lines, and performing emergency work, including assisting other electricity providers with their networks.

Blue oversees the Line Superintendent (“Superintendent”),<sup>4</sup> mechanic, area maintenance men, construction foremen (“CFs”), and linemen. The lineman position contains two subclassifications: apprentice and journeyman. All area maintenance men and CFs are also journeyman linemen. The Employer currently employs one Superintendent, one mechanic, three area maintenance men, two CFs, four journeymen, and one apprentice.

Blue directly supervises the sole mechanic, one journeyman in Council Grove, and two area maintenance men—one in Council Grove and one in Hillsboro. Superintendent Tim Jirak testified that he watches over the 3-person Hillsboro construction crew, including the CF in Hillsboro, and the Employer’s organization chart shows he directly supervises the other area maintenance man assigned to Hillsboro.

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<sup>4</sup> Also referred to in the record as Area Superintendent.

On February 19, 1960, Petitioner was certified as the exclusive collective-bargaining representative for all production and maintenance employees employed by the Employer. The current collective-bargaining agreement between the Employer and Petitioner is effective from October 1, 2019, until September 30, 2022, and recognizes Petitioner as the representative of “[a]ll employees, excluding office and office clerical employees and professional employees, supervisory employees and guards, as defined in the Labor-Management Relations Act.”

Employees generally work 8:00 a.m. to 4:30 p.m., except in the summer when they work 7:00 a.m. to 3:30 p.m. due to the heat and receive a 30-minute lunch period. According to the parties’ collective-bargaining agreement, the workweek is five consecutive days either Monday through Friday or Tuesday through Saturday. Work performed outside of the regularly scheduled workday or workweek receives overtime pay. The contract also sets the wages for groundman, apprentice lineman, journeyman lineman, and area maintenance man positions.<sup>5</sup>

### **Construction Foremen (“CFs”)**

The Employer currently employs two individuals in the construction foreman (“CF”) position—one in Council Grove and one in Hillsboro. The CFs are also journeyman linemen. The Council Grove CF leads two other journeyman linemen while the Hillsboro CF leads a journeyman and an apprentice.<sup>6</sup> Each crew contains three company vehicles—a pickup truck,<sup>7</sup> a bucket truck, and a digger truck—which are operated by different members of the crew. The pickup truck has a bed with some tool bins. The bucket truck or aerial device is a piece of equipment used to get personnel and/or material to work on up in the air to work on distribution lines. The digger truck is a large truck that can haul and set utility poles. The CF is considered a member of the crew and works alongside the other crew members.

The Council Grove CF testified that 90% of his job as CF was the same as when he was a journeyman. Former Operations Manager Damien Hebert corroborated that 90% of the CF job was performing journeyman duties and testified:

The additional 10% is ... the ability to be able to lead those other journeymen or those other crew members, the ability to ensure that the equipment is functioning

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<sup>5</sup> The record does not disclose why the CF position was not historically considered part of the bargaining unit.

<sup>6</sup> Record evidence suggests the Employer has employed more than two CFs in the past and CFs have overseen crews with as many as seven linemen.

<sup>7</sup> The truck may also be a flatbed.

properly and cared for properly, the ability to organize the jobs and plan the jobs, to meet with the public, meet with other officials and that sort of thing.

Hebert further explained that CFs work independently with Kansas Department of Transportation (“KDOT”) officials, county road and bridge officials, and the Employer’s other department heads, although he did not indicate how often this happened or provide the details of any specific interactions. One of the CFs described the additional 10% as paperwork, such as signing off on employee timesheets.

### **1. Assign**

At the beginning of a workday, the CFs receive work orders, including service orders, from the Operations Manager or Superintendent.<sup>8</sup> The CF may receive one order or multiple orders. The Operations Manager or Superintendent may prioritize certain orders based on an emergency<sup>9</sup> or a new build for a new business or residence. Both CFs and former Operations Manager Hebert testified that the sequence in which orders are completed is “common sense” and based on weather and geographic terrain, along with traffic patterns. For example, work orders on mud roads or in field or pastures will be completed when the ground is dry and before any forecasted rain.

Materials needed for a particular job are listed on the back of the work order. They are often preordered and segregated at the warehouse. Before leaving the Employer’s warehouse, the CF and his crew load the materials for the orders on which they will be working that day, although sometimes the necessary materials are already on the trucks.

At the jobsite, the CF leads his crew in a “tailgate,” a meeting where everyone discusses how the particular job is going to be accomplished and reviews safety protocols, using a checklist on an iPad application.<sup>10</sup> Both CFs and Hebert testified that the entire crew, including the CFs, collaborate on how to complete the job.

Both CFs further testified that their crew members perform particular tasks based on a regular daily rotation, typically based on which company vehicle they operate at the time. For example, if the apprentice lineman in Hillsboro was operating the bucket truck on Tuesday, he would go up in the bucket on Tuesday. On Wednesday, the apprentice would then be operating the digger truck and performing functions associated with it.

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<sup>8</sup> General Manager Goeckel testified that work orders could also come from the Employer’s independent engineer; however, the record does not indicate if, or how often, that happens.

<sup>9</sup> There is no evidence CFs determine which employees are called out for emergencies outside of regular work hours.

<sup>10</sup> Hebert said the tailgate has existed in the industry for more than 40 years and the safety checklist used to be on paper.

The exception to the rotation is if an employee does not have the skills necessary for a particular job or is not comfortable performing specific work. According to the Hillsboro CF, the apprentice lineman on his crew would not perform energizer work because it is known that the apprentice is not currently capable of performing that type of work.<sup>11</sup> Regardless, all crew members offer instruction, guidance, and on-the-job training when completing work orders.

Operations Manager Blue and Hebert said that a CF determines whether to hold his crew past regular work hours to complete a work order; however, both CFs testified that their crews only work overtime in outages, emergency situations where power needs restored. The record does not contain any other factors CFs consider when determining to work a crew past their regular work hours, nor does it indicate how often CFs direct their crews to work overtime. Similarly, there is no evidence the CFs call employees into work outside of work hours or send employees home early.

## **2. Responsibly Direct**

As Operations Manager, Hebert performed periodic “crew visits” where he went to a jobsite and reviewed items on a checklist provided by Employer’s insurer, Federated Rural Electric Insurance Corporation. Hebert gave examples of attending the tailgate meeting, reviewing how the trucks were setup, and making sure the poles were set properly. On a semiannual basis, Hebert also reviewed a majority of the work orders completed by construction crews with a consulting engineer from the Employer’s energy provider in Topeka, Kansas. This is a requirement of the Rural Utility Service.

Hebert also gave the example of a construction crew framing poles “backwards” on a job, after which he gave oral guidance first to the CF and then explained how he wanted it done to the other lineman. Hebert specified that he gave guidance and it was not a reprimand.

The record contains two instances of CFs being suspended for safety violations but does not contain the appraisals or evaluations of any CFs.

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<sup>11</sup> Similarly, the Council Grove CF stated that his entire crew would discuss what tasks an older journeyman with back problems could perform but the journeyman with back problems made the ultimate decision on what tasks he was physically capable of doing.

### **3. Transfer**

Linemen and area maintenance men<sup>12</sup> can be temporarily transferred, including on a “day-to-day” basis, from one crew to another and permanently transferred from one warehouse to the other. A day-to-day transfer occurs when a CF requests help for a particular work order, which usually happens when his crew is short either equipment or personnel needed for the job. For example, the CF may need a second bucket truck or more than the three members of his crew to safely perform a job. Similarly, if someone on his crew is absent then he could request a day-to-day transfer if his jobs that day required a full 3-person crew.

According to Operations Manager Blue and former Operations Manager Hebert, one CF requests assistance from the other CF. Blue also said that he could overrule CFs’ decision on a day-to-day transfer, and Hebert noted that he had denied day-to-day transfers, albeit rarely, due to specific needs of the Employer that day of which the CFs were not aware. Hebert also testified that day-to-day transfers were involuntary but if the employee objected to the transfer he would deny it. However, the Council Grove CF and the Hillsboro CF testified that they contacted the Operations Manager and Superintendent, respectively, when they needed a day-to-day transfer and the day-to-day transfer was ultimately arranged by the manager.<sup>13</sup> The Hillsboro CF further testified that the Superintendent had delayed his requests for a day-to-day transfer based on the needs of the Employer. The record does not detail how a CF determines their crew is short the necessary equipment or personnel to complete a work order.

The record contains one example of a longer transfer,<sup>14</sup> which took place within the past two years. The transfer involved an apprentice lineman, who was working on the maintenance crew, transferring to the Council Grove construction crew. At the time, a journeyman lineman in Council Grove was on leave due to problems with his back. Because his crew was short a member, the Council Grove CF mentioned that the apprentice on the maintenance crew needed construction experience to advance to journeyman. The Council Grove CF testified that he mentioned the opportunity but did not say that he recommended the transfer. The apprentice worked on the Council Grove crew for several months before leaving the Employer.

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<sup>12</sup> The record does not disclose many details regarding the difference between an area maintenance man and a lineman beyond area maintenance men perform maintenance work while regular linemen perform construction work.

<sup>13</sup> The record indicates area maintenance men, who operate bucket trucks, also transfer to a CF crew on a day-to-day basis when help is requested; however, the record does not disclose the process for a CF to request an area maintenance man’s day-to-day transfer—to whom the request would be made or who would ultimately approve the request.

<sup>14</sup> While it was referred to multiple times as a permanent transfer, the record indicates the transfer was temporary.

The Council Grove CF further testified he was unsure about the status of the transfer because, even after the apprentice began working on his crew, he never signed off on the apprentice's timesheets and was not involved in the apprentice's interview to advance to journeyman, which is required by the parties' collective-bargaining agreement.<sup>15</sup>

Operations Manager Blue described the decision to transfer as a collaboration between himself, who was the maintenance foreman at the time,<sup>16</sup> the Council Grove CF, and Hebert, who was the Operations Manager at the time.

#### **4. Evaluate**

The record contains three variations of an employee evaluation,<sup>17</sup> which are "to be completed by supervisor." All three have the same four groupings, which provide for listing the following: (1) the employee's primary job duties and assignments; (2) any specific changes, areas of improvement, or performance goals from last appraisal that still need attended to; (3) any specific changes, areas of improvement, or performance goals for the next appraisal period; and, (4) List supported development activities and training to improve employee's performance (consider employee growth and career development). The evaluations conclude with checkboxes for whether the employee's performance "meets," "does not meet," or "is far below" the expectations of the position, and an area for "supervisor comments."

Superintendent Jirak testified that when he was a CF he went over the evaluation with the employee he was evaluating and then turned it into the Operations Manager. Similarly, both the Council Grove CF and the Hillsboro CF described sitting down with employees on their crew and completing the evaluation together. Among other things, a journeyman in Council Grove had the CF add "build his 401(k) and retirement" to his evaluation in 2018 and a journeyman in Hillsboro had the CF include that he wanted the opportunity to learn the maintenance side of the Employer's operation on his 2020 evaluation because he had yet to be exposed to it.

None of the evaluations in the record reference rewards (e.g., time off) or bonuses or discipline, including probation, suspension, or discharge. Nor does the record contain any examples of employees being rewarded or promoted or disciplined,

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<sup>15</sup> The record suggests the posting and bidding procedures for permanent transfers in Art. VIII, Sec. 4, were not followed.

<sup>16</sup> The maintenance foreman position ceased to exist when Blue was promoted to Operations Manager in November 2020.

<sup>17</sup> The examples from 2006 are entitled Employee Performance Evaluation; from 2018, Supervisor's Performance Plan; and, from 2020, Employee Performance Review.

including probation and suspension, based on their evaluations. Former Operations Manager Hebert testified about a groundman,<sup>18</sup> who the Employer terminated in 2006. According to Hebert, the groundman was terminated based on three evaluations, two from CFs and one from then-Superintendent<sup>19</sup> Lyle Gillett, all of which indicated the employee did not meet the expectations of the job and would not be able to make journeyman. However, none of the evaluations recommend or even mention discharge or termination. The separation notice was completed by Hebert, using information from the three evaluations, and listed Gillett as the supervisor.

## **5. Discipline, Suspend, and Discharge**

Current Operations Manager Blue testified that CFs have the authority to issue oral and written reprimands; however, he did not know of any instances when a CF had issued an oral or written discipline to an employee. Superintendent Jirak and former Operations Manager Hebert testified that oral reprimands were generally issued for potential safety violations or an employee not following the correct procedure (i.e., correcting an employee); however, both acknowledged that oral reprimands are typically discussions that provide guidance to the employee, and neither quantified the number of oral reprimands that constituted discipline. Similarly, the Council Grove CF testified that he had issued oral reprimands in the distant past but explained they were merely discussions about “how things needed to work” and did not carry any consequences. The Hillsboro CF testified that he had not issued any oral reprimands, although he thought he had the authority to do so; however, the record does not reveal what he considers to be an oral reprimand. An 8-month apprentice lineman from Hillsboro said he had never received an oral reprimand or witnessed another employee receive an oral reprimand.

The Employer does not keep a record of oral reprimands and they do not always get reported up the chain-of-command.

Hebert also testified that a written reprimand would only be issued for egregious safety violations that could harm other crew members or the public or damage equipment but that no written reprimands were issued by CFs during his 20-year tenure at the Employer. The Hillsboro CF testified that he only discovered he had the authority to issue written reprimands at the pre-election hearing.

There is no evidence in the record of a CF ever suspending an employee. Hebert testified that he, as Operations Manager, had suspended a lineman and the Council

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<sup>18</sup> Addendum A of the parties' collective-bargaining agreement indicates the groundman position earns about \$10 less than an apprentice lineman.

<sup>19</sup> Referred to in the record as an operating superintendent and an area superintendent.



Grove CF, due to a safety incident. According to the Council Grove CF, CFs do not have the independent authority to suspend an employee, but they could request that an employee be suspended. However, the record does not disclose the process for suspension based on such a request, who would make the decision to suspend, or if the request would ultimately be followed.

## **6. Promote and Reward**

According to the parties' current collective-bargaining agreement, advancement of apprentices to the next respective grade requires the majority approval of the crew foreman, department head, and shop steward and is done in consultation with management. Apprentices must also complete certain bookwork and testing.

The record contains one example of a promotion in November 2019—an apprentice lineman being promoted to journeyman. The apprentice had previously worked on the maintenance crew but was working on the Council Grove construction crew at the time of his promotion. Before promotion, the apprentice was interviewed by then-maintenance foreman Blue and then-Operations Manager Hebert. Then, pursuant to the parties' contract, the Petitioner's steward gave his approval. The Council Grove CF was not involved with the apprentice's promotion. Nothing in the record suggests that the parties' agreement is not followed or that CFs are involved with the apprentice's bookwork or testing.

The record contains no evidence of employees receiving awards or bonuses.

Despite company policy stating that time off requests should be made to the CFs, the record shows the actual practice is that employees submit their requests directly to the Operations Manager because he has ultimate approval.

## **7. Hire**

Applicants for a lineman position or internship<sup>20</sup> take part in a group interview. The CF of the crew for which the applicant will work if hired sometimes participates in the group interview. The Operations Manager leads the group interview and asks a majority of the questions; however, the CF has the ability to ask questions although they may not always do so. The Employer does not provide the CF with a list of questions. Following the interview, all the interviewers discuss the applicant's responses and offer their opinions. Former Operations Manager Hebert testified that CFs have "considerable input" and "the last say" regarding new hires that would be working on their crew while

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<sup>20</sup> The record does not disclose the hiring process for other job classifications (e.g., groundman, area maintenance man, mechanic).

the Council Grove CF characterized his involvement with the interview process as “slim.”

The record reveals only one new hire under current Operations Manager Blue—an apprentice on the Hillsboro construction crew. Blue testified that everyone discusses the applicant’s responses and a decision is made “based off all those recommendations.” However, the group interview was conducted by then-Operations Manager Hebert and Superintendent Jirak. The Hillsboro CF was not present, and there is no evidence he participated in the decision to hire the apprentice.

Blue further testified that a CF has never disagreed with the Operations Manager over hiring a particular applicant, and there is no evidence anyone has ever disagreed with any of the ultimate decisions to hire or not.

The record is not clear if CFs are present at all of the interviews for all lineman applicants.

## **8. Adjust Grievances**

The parties’ current collective-bargaining agreement differentiates between “complaints,” which it defines as an “oral dispute,” and “grievance,” which is when “the complaint is reduced to writing.”

When an employee has a complaint he can raise it with the CF. Both CFs testified that they have never received a grievance or been involved with the grievance procedure. The Hillsboro CF further testified that he had never received training on how to handle a grievance. According to former Operations Manager Hebert, only three written grievances were filed during his 20 years with the Employer, and all three were filed directly with him.

## **9. Other Duties and Terms and Conditions of Employment**

As noted above, CFs may meet with local officials. They also may meet with the public and customers in instances like road closures or property issues (e.g., tree trimming or crop damage).

The CFs attend the supervisors’ meeting, which occurs once a month after the company-wide safety meeting. Topics at the supervisors’ meetings range from budgetary items and equipment issues to significant upcoming projects, including problems with access and the public, and personnel issues. There is no testimony that the CFs make recommendations regarding crew members’ terms and conditions of employment at the meetings.

Superintendent Jirak and the Council Grove CF both testified that CFs receive a higher wage than journeyman linemen and different benefits; however, the record does not disclose how much more CFs are paid or how their benefits are different.

The record shows CFs are assigned dedicated company cellular phones while the other linemen on their crews are not.<sup>21</sup>

The record does not reveal whether CFs have any type of visual identifiers (e.g., uniforms) distinguishing them from regular linemen.

## **II. INCLUSION OF UNREPRESENTED EMPLOYEES WITH AN EXISTING BARGAINING UNIT**

### **A. Board Law**

An *Armour-Globe*<sup>22</sup> self-determination election is the proper way for an incumbent union to add unrepresented employees to its existing unit. For the Board to find the inclusion to be appropriate, it must first determine that (1) the petitioned-for employees “constitute an identifiable, distinct segment so as to constitute an appropriate voting group,” and (2) that voting group shares a community of interest with existing unit employees. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990) (citing *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972)); see also, *FreshPoint Southern California, Inc.*, Case 28-RC-252613 (2020) (unpublished).<sup>23</sup>

Whether a voting group is an “identifiable, distinct segment” is not the same question as whether the voting group constitutes an appropriate unit. *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011) (citing *Warner-Lambert*, 298 NLRB at 995). The “identifiable and distinct” analysis asks merely whether the voting group sought unduly fragments the workforce or constitutes an arbitrary segment of unrepresented employees. *Capital Cities Broadcasting*, above at 1063.

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<sup>21</sup> However, Art. XVI, Sec. 6, of the parties’ current collective-bargaining agreement states the Employer will provide a cellular phone to the employees who are on call based on the call-out lists.

<sup>22</sup> See *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

<sup>23</sup> The Board does not use the 3-step analysis set forth in *PCC Structural, Inc.*, 360 NLRB No. 160 (2017), as clarified by *Boeing Co.*, 368 NLRB No. 67 (2019), which applies only “when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit.” *Boeing*, above, slip op. at 2. See also *Dillon Cos., Inc. v. NLRB*, 809 Fed.Appx. 1 (D.C. Cir. 2020) (unpublished opinion) (finding Board applies *Warner-Lambert* standard in *Armour-Globe* self-determination representation proceedings). However, the first and third steps of the analysis “reference broad principles that are generally applicable to unit determinations.” *Macy’s West Stores, Inc.*, Case 32-RC-246415 fn. 1 (2020) (unpublished).

## **B. Application of Board Law to This Case**

As noted above, neither party asserts that the petitioned-for CFs are not an identifiable, distinct segment of the Employer's employees or that they lack a community of interest with the existing unit. Moreover, the record indicates that the CFs are an identifiable and distinct segment, as they are the only crew leaders under the Operations Manager, and share a community of interest, as 90% of their job is the same as the journeyman linemen in the existing unit, and journeyman linemen and area maintenance men substitute for CFs in their absence.

Accordingly, an *Armour-Globe* self-determination election is appropriate.

## **III. SUPERVISORY STATUS**

### **A. Board Law**

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) defines a "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The 12 statutory criteria (or "primary indicia") for supervisory status set forth in Section 2(11) are read in the disjunctive, making possession of any one of the indicia sufficient to establish an individual as a supervisor. Therefore, individuals are statutory supervisors if: 1) they hold the authority to engage in any one of the dozen primary indicia listed in Section 2(11); 2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and 3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994); *Shaw, Inc.*, 350 NLRB 354, 355 (2007).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006); *J. C. Brock Corp.*, 314 NLRB

157, 158 (1994). The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *DirecTV U.S. DirecTV Holdings LLC*, 357 NLRB 1747, 1748-1749 (2011); *Children's Farm Home*, 324 NLRB 61 (1997); see also *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 5 (2016); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights protected by the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare*, above at 687. In *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2152-2154 (2011), aff. in relevant part 810 F.3d 287, 294 (5th Cir. 2015), the Board specifically directed that the prescriptions for determining supervisory status enunciated in *Oakwood Healthcare* apply in the utility industry.

Nonstatutory indicia (or "secondary indicia") can be used as background evidence to support a finding of supervisory status but are not dispositive without evidence demonstrating the existence of one of the primary or statutory indications of supervisory status. See *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Compare *K.G. Knitting Mills, Inc.*, 320 NLRB 374 (1995) (finding no primary indicia were present, where individual opened facility in the morning, "watche[d] everything" before the manager arrived, and processed trucks arriving at plant). Four types of secondary indicia commonly mentioned by the Board are the ratio of putative supervisors to employees, differences in terms and conditions of employment, attending management meetings, and how the individual in question is held out to, or perceived by, other employees.

The burden of establishing supervisory status rests on the party asserting that such status exists. *NLRB v. Kentucky River*, 532 U.S. at 711; *Shaw, Inc.*, 350 NLRB at 355; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). "The party seeking to prove supervisory status must establish it by a preponderance of the evidence." *Oakwood Healthcare*, 348 NLRB at 694; *Croft Metals*, 348 NLRB at 721. "Purely conclusory evidence does not satisfy that burden. Lack of evidence is construed against the party asserting supervisory status." *Veolia Transportation*, 363 NLRB No. 98, slip op. at 7 (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003)). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Ibid.* (citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). See also *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072-1073 (2015); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Shaw, Inc.*, above at 357 fn. 21; *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 9 (2006); *Oakwood Healthcare*, above at 693. See also *Coral Harbor Rehabilitation & Nursing Center*, 366

NLRB No. 75, slip op. at 18 (2018) (citing *Gaines Electric Co., Inc.*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enf. 961 F.2d 1578 (6th Cir. 1992)).

Testimony that an individual “has the authority,” without more, runs the risk of being given little evidentiary weight, as it is conclusory, and responses to leading questions are devalued because they suffer the weakness of being the testimony of the questioner rather than the witness. *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977). Similarly, the Board has consistently held that the “paper” authority found only in job descriptions is insufficient by itself to establish actual supervisory authority under Section 2(11). See, for example, *CHI Lakewood Health*, 365 NLRB No. 10, slip op. at 1 fn. 1 (2016) (cases cited therein). Such evidence does not constitute the specific, detailed evidence necessary to establish alleged supervisors possess primary indicia consistent with the concern expressed that it is the actual duties and actual accountability of the worker that count when determining supervisory status. *G4S Regulated Security Solutions*, above at 1072-1073.

## **B. Application of Board Law to This Case<sup>24</sup>**

Of the 12 primary indicia for supervisory status, the Employer argues CFs use independent judgment to hire, transfer, promote, reward, adjust grievances, discipline, suspend, discharge, assign, and responsibly direct<sup>25</sup> employees who work on their crews, or effectively recommend such action. The Employer does not contend, and the record contains no evidence, that CFs lay off or recall employees, or effectively recommend such action, by virtue of their independent judgment. Petitioner maintains any supervisory authority held by CFs is exercised in a merely routine, clerical, or perfunctory manner, rendering them employees under the Act.

### **1. Assign**

The Board defines “assign” as referring “to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an

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<sup>24</sup> My decision does not recite every piece of record evidence. To the extent that some testimony may contradict what is presented below, it simply means that the evidence is in conflict, and the Board will not find supervisory status under those circumstances.

<sup>25</sup> The Employer contends CFs possess seven primary indicia. In its closing argument at hearing, it listed these as assign, responsibly direct, hire, transfer, promote, discipline, adjust employee grievances. However, in its statement of position and post-hearing brief, the Employer listed CFs’ seven primary indicia as hire, transfer, suspend, promote/reward, adjust grievances, discharge, and assign. This decision addresses all 10 primary indicia the Employer raised in the record throughout the pre-election proceedings.

employee.” *Oakwood Healthcare*, 348 NLRB at 689 (2006). Elaborating on this definition, the Board stated that “assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night), or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ ... However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of” assignment authority. *Ibid.* As noted above, assignment of work in a merely routine or perfunctory manner, where there is only one self-evident choice, or solely based on equalizing workloads does not require independent judgment. *Id.* at 693.

Assignments that are based on well-known employee skills also do not involve independent judgment. *CNN America, Inc.*, 361 NLRB 439, 460 (2014) (citing *KGW-TV*, 329 NLRB 378, 381-382 (1999)), *enfd.* in relevant part 865 F.3d 740 (D.C. Cir. 2017) (“shift supervisors essentially followed an established pattern of assignments—who had done the specific assignment before—and relied on their knowledge of their coworkers’ skills”); see also *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Similarly, basing an assignment on whether the employee is capable of performing the job does not involve independent judgment. See *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004)); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1154 (2015) (citing *Croft Metals*, 348 NLRB at 722).

#### **a. Designating an Employee to a Place**

Testimony from both CFs and former Operations Manager Hebert indicates the typical sequence in which crews complete work orders is “common sense” and based on weather and geographic terrain. Emergencies take precedence over other work and the Operations Manager and Superintendent can and do prioritize certain orders over others. The record contains no other specific factors or descriptions of how CFs determine the sequence in which orders are performed and, therefore, the employees’ worksite.

Accordingly, the evidence is insufficient to show that CFs designate employees to a place or effectively recommend their designation to a place, using independent judgement, within the definition of “assign” under Section 2(11) of the Act.

#### **b. Appointing an Employee to a Time**

While the Operations Managers and Superintendent testified that CFs have the authority to extend employees’ workdays, the evidence shows that CFs only hold employees past their regular work hours when restoring power in emergency situations (outages). The record also suggests the CFs lack of discretion in emergency situations, inasmuch as they are the highest priority of work order, and fails to disclose any other

factors CFs consider when having employees work overtime. Importantly, the record does not indicate that outages are more than a sporadic occurrence.

There is no evidence the CFs can call an employee into work or send an employee home early.

Accordingly, the record does not support finding CFs appoint employees to a time or effectively recommend their appointment to a time, using independent judgment, within the definition of “assign” under Section 2(11) of the Act.

### **c. Giving Significant Overall Duties to an Employee**

The record indicates that crew members’ assignments are based on a regular rotation, the known skills of the employees, and employee preference in a collaborative discussion among the entire crew before each job. The record reveals construction and building materials are often prepackaged for particular work orders. If not, the required materials are listed on the back of the order and employees retrieve the materials on their own with no specific directions given.

Accordingly, the evidence is insufficient to find that CFs give significant overall duties to employees or effectively recommend the same, using independent judgment, within the definition of “assign” under Section 2(11) of the Act.

## **2. Responsibly to Direct**

If a putative supervisor “has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 691. Responsible direction means not only being able to take action to ensure tasks are performed correctly by an employee, but also that there is a prospect of material consequences to the alleged supervisor if the directed employees do not perform their tasks correctly. *Id.* at 691-692; *Golden Crest Healthcare Center*, 348 NLRB 727, 731 and fn. 13 (2006) (finding no evidence of material consequence, or that purported supervisors were informed such consequences might result, from subordinates’ performance). Accountability may be shown by either negative or positive consequences to the putative supervisor’s terms and conditions of employment, as a result of the putative supervisor’s performance in the direction of others. *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 4 (2016).

The record does not contain any appraisals or evaluations of CFs nor is there any evidence a CF has received rewards or promotion based on the performance of the



employees on his crew. The Employer produced two letters of suspension from 2020, one for the Council Grove CF and the other for a journeyman lineman on his crew.

The letter states Council Grove CF was suspended in accordance with “Cooperative Safety Policy Number 10E, Paragraph 7 b II,” but Policy 10-E was not introduced as evidence. The letter also highlights the CF’s responsibilities to safeguard his crew and equipment, to properly plan work, recognize hazards at the worksite, and to take the proper precautions to protect employees and equipment. Thus, the letter suggests the CF was suspended based on their own deficient performance rather than being held accountable for the failures of their subordinates.

Similarly, the Hillsboro CF testified that the Employer gave him a letter around 2019 that he would not receive a pay raise for six months due<sup>26</sup> to an accident, where an oil distribution pole rolled off the back of a truck and struck an apprentice lineman on the ground. The record suggests the apprentice was positioned incorrectly but does not provide further details, including whether the apprentice suffered any employment consequences. Former Operations Manager Hebert testified that a CF could be terminated if he did not hold tailgates, including signing off that safety checklists had been completed, and the Hillsboro CF further testified that he was responsible for the accident. Thus, the evidence fails to show the delay in the CF’s wage increase was a consequence of the apprentice’s actions rather than the CF’s own failure to correct the apprentice.

Accordingly, the record does not support finding CFs responsibly direct the work of others, using independent judgment, to the degree necessary for establishing supervisory authority under Section 2(11) of the Act.

### **3. Transfer**

As with other primary indicia, the ability to transfer or effectively recommend transfer must be accomplished with independent judgment to confer supervisory status. See *Croft Metals*, 348 NLRB at 718 (finding lead person a nonsupervisor where, among other things, the lead person’s supervisor decides whether it is necessary to temporarily transfer an employee to the crew from another part of the plant); *Children’s Farm Home*, 324 NLRB 61, 67 (1997) (affirming no supervisory status where purported supervisors can arrange temporary transfers of employees, but have no authority to permanently transfer employees); *Greenpark Care Center*, 231 NLRB 753, 754 (1977) (finding no supervisory status where purported supervisor transfers employees but “transfer is temporary in nature, its duration being only the time needed to assist during the emergency or absence”); see also *PPG Aerospace Industries*, 353 NLRB No. 23, slip

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<sup>26</sup> Former Operations Manager Hebert confirmed that the Hillsboro CF did not receive his pay raise as originally scheduled due to the accident.

op. at 1 (2008) (finding no supervisory authority “[w]here the putative supervisor serves as a conduit relaying assignments from management”); *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1435-1436 (2007) (affirming individual was an employee despite exercising the authority to transfer employees to different tasks for short periods of time).

In the instant case, the CFs testified that they requested day-to-day transfers when the work orders required equipment or personnel levels, and the Operations Managers testified that they could overrule and, in fact, had denied some day-to-day transfer requests. Moreover, the record does not reveal that day-to-day transfers occur more than sporadically or that CFs use more than routine judgment. The evidence does not indicate if CFs regularly request specific employees or simply request the vehicle and equipment needed on a particular day, nor does it identify any other factors CFs consider when making a day-to-day transfer request.

The evidence regarding the longer transfer of an apprentice lineman from maintenance to the Council Grove construction crew is, at best, inconclusive for establishing CFs as statutory supervisors. The record is not clear that the Council Grove CF even recommended the transfer or that the apprentice was officially transferred, as the CF was not signing off on his timesheets and was not involved in his advancement interview, which is required under the parties’ collective-bargaining agreement. In addition, Operations Manager Blue described the transfer as a “collaboration” between the CF, the Operations Manager, and the maintenance foreman.

Accordingly, the evidence is insufficient to show that CFs transfer, or effectively recommend the transfer of, employees as defined in Section 2(11) of the Act.

#### **4. Discipline, Suspend, and Discharge, including Evaluate**

To establish the supervisory authority to discipline, asserted disciplinary authority, including the authority to suspend or discharge, “must lead to personnel action without independent investigation by upper management.” *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 8 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), *enfd.* in pertinent part 317 F.3d 316 (D.C. Cir. 2003)). See *Lucky Cab Co.*, 360 NLRB 271 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)); *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965).

The authority to evaluate is not a supervisory indicium under Section 2(11). *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 (2014); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Even so, the Board analyzes the authority to evaluate to determine whether it is an “effective recommendation” of promotion, reward (e.g., wage increase), or discipline. See *Phelps Community Medical Center*, 295 NLRB

486, 490 (1989); see also *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 723 (7th Cir. 2000). The Board will find supervisory status if the evaluation leads directly to personnel actions but will not find supervisory status if the evaluation does not, by itself, directly affect other employees' job status. See *Vencor Hospital-Los Angeles*, 328 NLRB at 1139-1140 (1999); see also *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997) (evaluations must, by themselves, affect job status); *Passavant Health Center*, 284 NLRB 887, 891 (1987) (authority simply to evaluate without more is insufficient to find supervisory status). Thus, the preparation of evaluations confers supervisory status only if the evaluation, by itself, directly affects the wages and/or job status of the individuals being evaluated. See *Williamette Industries, Inc.*, 336 NLRB 743, 743-744 (2001); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000).

**a. Discipline**

The authority to issue verbal reprimands, without more, does not establish the authority to discipline. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Washington Nursing Home, Inc.*, 321 NLRB 366, 371 (1996); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987). Similarly, "the mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority." *Ibid.* (citing *Heritage Manor Convalescent Center, Inc.*, 269 NLRB 408, 413 (1984)).<sup>27</sup> Where the evidence is in conflict as to whether a particular type of corrective action constitutes discipline, the Board will find that the party asserting supervisory status has not met its burden. See, for example, *Veolia Transportation*, above, slip op. at 7-8 (conflicting testimony on whether mere issuance of "observation notice," as well as coaching and counseling, constituted discipline). Warnings or counseling forms that bring substandard employee performance to the employer's attention absent a recommendation for future discipline are merely reportorial and thus are not evidence of supervisory authority. *Id.*, slip op. at 7; *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). Thus, a warning that simply describes an incident without recommending any disposition is merely reportorial where higher management determines what discipline, if any, is warranted based on the incident. *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000); see also *Shaw, Inc.*, 350 NLRB at 356-357 (record did not establish writeup forms played significant role in disciplinary process).

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<sup>27</sup> See, for example, *Republican Co.*, 361 NLRB 93, 96-97 (2014) (verbal warning did not establish supervisory status where there was no evidence it had effect on warned employee's job status or tenure); *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998) (written reprimand not disciplinary without evidence "job affecting discipline" resulted); *Azusa Ranch Market*, 321 NLRB 811, 812-813 (1996) (written warnings not shown to have any effect on employee's employment status); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings do not establish supervisory status where merely reportorial and not clearly linked to disciplinary action affecting job status).

Nothing in the record, including the parties' current collective-bargaining agreement, defines discipline or establishes a progressive disciplinary system. It is uncontroverted that CFs have the authority to issue oral reprimands, but the record is insufficient to show oral reprimands are, in fact, discipline as defined in Section 2(11) of the Act. There are no specific examples of actual oral reprimands in the record, and witnesses agree that oral reprimands are typically only guidance or a discussion. Despite testimony from the former Operations Manager that oral reprimands can affect job status if they are repeated, the Employer does not record oral reprimands and there is no evidence that oral reprimands have ever affected an employee's job status, nor does the record contain any details on how many oral reprimands it would take to affect an employee's job status.

Recent evaluations, which were collaboratively completed by CFs and the appraisee, contain no references to discipline, including suspension or discharge, and there is no evidence evaluations affected the employee's job status.

Testimony from Operations Managers and CFs shows that a CF has neither drafted nor issued a written reprimand in the last 20 years.

Accordingly, the record lacks sufficient specifics and detail to establish that CFs have the authority to discipline or effectively recommend discipline for finding supervisory status under Section 2(11) of the Act.

**b. Suspend**

The record contains no evidence that a CF has ever suspended an employee or recommended an employee's suspension.<sup>28</sup> Both current CFs testified that they did not have the authority to suspend employees. While the Council Grove CF testified that he had the authority to request the Operations Manager suspend an employee, the record does not indicate how the Operations Manager would regard the request, the process for granting or denying the request, or whether the request would always be approved.

Accordingly, the evidence is insufficient to show that CFs can suspend, or effectively recommend suspension of, employees using independent judgment.

**c. Discharge**

The Employer points to the termination of a groundman in 2006 to establish that CFs possess the authority to effectively recommend an employee's termination, using

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<sup>28</sup> The record contains only one instance of a non-CF employee being suspended, which was initiated by then-Operations Manager Hebert (and also involved the suspension of the Council Grove CF due to a safety incident).

independent judgment. In that example, then-Operations Manager Hebert terminated the employee because the evaluations of two CFs and the Superintendent-at-the-time stated the employee did not meet the expectations of the job and further commented that he would not be able to advance to lineman. Importantly, neither of the CF evaluations contained a recommendation to terminate the employee. See *Passavant Health Center*, 284 NLRB 887, 891 (1987) (finding evaluations did not constitute “effective recommendation” where they carried “no recommendations for specific personnel action”. Authority simply to evaluate without more is insufficient to find supervisory status)

Moreover, a single instance, occurring over 14 years earlier, is insufficient to establish that CFs possess or regularly exercise the authority to effectively recommend discharge. See, for example, *G4S Regulated Security Solutions*, 362 NLRB at 1074 (finding evidence of purported supervisory status to be stale when “all except one of the eight disciplinary notices were at least 2 years old”).

## **5. Promote and Reward, including Evaluate**

The Board will not find supervisory status where the record lacks evidence showing what weight, if any, is given to a purported supervisor’s recommendation for promotion or wage increase. See, for example, *Custom Mattress Mfg., Inc.*, 327 NLRB 111, 112 (1998). The Board has found the authority to promote where the putative supervisor is the only one involved and the decision is not reviewed by others. It has also found supervisory status where a crew leader had the authority to block promotion because advancement required a unanimous decision by all crew leaders. *Entergy Systems & Service, Inc.*, 328 NLRB 902, 902-903 & fn. 3 (1999).

In the instant case, the evidence is limited to an instance of an apprentice being promoted to journeyman. Despite language in the letter of promotion stating it was based on apprentice’s “knowledge, skill, and performance in the field and on the recommendations of the construction and maintenance foremen,” the record shows that CF was not involved in the promotion. The evidence establishes the Employer follows the contractual advancement procedure requiring majority approval from the apprentice’s CF, department head, and the Petitioner’s shop steward, in consultation with management. As it takes majority approval, the single vote of the CF does not control whether an apprentice gets promoted. Further, former Operations Manager Hebert testified that the ultimate decision to promote was his alone.

As explained above, the Board analyzes the authority to evaluate to determine whether it is an “effective recommendation” of promotion and reward (e.g., wage increase, time off, etc.), but requires specific detailed evidence the recommendation results in reward. See, for example, *Custom Mattress Mfg., Inc.*, 327 NLRB 111, 112 (1998) (overruling supervisory finding where the record lacked evidence showing what

weight, if any, was given to purported supervisor's recommendations for wage increases); *L. Suzio Concrete Co.*, 325 NLRB 392, 397-398 (1998) (finding "merely routine and clerical" purported supervisor's approval of time off based on whether other employees had already been granted time off on the day requested).

There is no evidence in the record showing that employee evaluations lead to promotion or reward. The record contains no reference to award or reward, including in the evaluations. Time off requests go directly to the Operations Manager and CFs are not involved. None of the employee evaluations mention promotion.

Accordingly, the record does not support finding supervisory status for CFs based on their authority to promote or reward, or effectively recommend the same.

## **6. Hire**

As with all supervisory functions, a hiring recommendation is not effective in the absence of a contention or finding that such recommendation is relied on without further inquiries. *Peacock Productions*, 364 NLRB No. 104, slip op. at 6 (2016) (citing *Republican Co.*, 361 NLRB 93, 97 (2014)); *Adco Electric Inc.*, 307 NLRB 1113, 1124 (1992), enf'd. 6 F.3d 1110 (5th Cir. 1993). Likewise, a hiring recommendation has not been shown to be effective where the influence of the recommendation on the ultimate decision is not known. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1425-1426 (2010); *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 759 (2000); *F.A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997). Testimony that decisions are collaborative is insufficient to show independent judgment free from the control of others. *CNN America, Inc.*, 361 NLRB 439, 460 (2014) (citing *KGW-TV*, 329 NLRB 378, 381-382 (1999)); *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7-8 (2016). Compare *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 962-963 (2004) (finding supervisory status where alleged supervisor alone interviewed applicants, recommended them for hire, and recommendations were followed based only on review of applications of recommended candidates); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (finding supervisory status where putative supervisors interviewed applicants on their own and made recommendations that were followed).

In the instant case, the Employer holds a group interview with applicants, which is led by the Operations Manager. During some of those interviews a CF is present and has the ability to ask questions of the applicant. While former Operations Manager Hebert testified that the CF had "the last say" and his opinion was the "most important" because he is the one who will be working with the new hire daily, the more-than-10-year Council Grove CF stated that his involvement with hiring interviews was "slim." Moreover, multiple witnesses, including Hebert and the Council Grove CF, testified that there has never been disagreement about whether an applicant should be hired.

Accordingly, the evidence in favor of CFs having the authority to effectively recommend hiring, using independent judgment, is at best in conflict and inconclusive and falls short of establishing supervisory status under Section 2(11) of the Act.

## **7. Adjust Grievances**

To establish that a putative supervisor has the authority to adjust grievances, he or she must be able to actually adjust grievances rather than merely resolve minor disputes or employee squabbles. *Ken-Crest Services*, 335 NLRB 777, 778-779 (2001).

The parties' current collective-bargaining agreement differentiates between "complaints," which it defines as an "oral dispute," and "grievance," which is when "the complaint is reduced to writing." The evidence shows CFs have never received a written grievance or been involved with the grievance procedure. Similarly, the record does not contain any examples of CFs resolving a dispute that would rise to the level of a grievance.

Accordingly, the record does not disclose that CFs adjust grievances, using independent judgment, to the degree necessary for establishing them as supervisors under Section 2(11) of the Act.

## **8. Secondary Indicia**

Although not dispositive, secondary indicia can support a finding of supervisory status where evidence indicates the existence of at least one of the primary indicia. However, the evidence of secondary indicia, like that of the primary indicia above, is too general and vague to suggest supervisory status. The only aspect clearly buttressing supervisory status is CFs attendance at supervisory meetings; however, the other factors undercut this support. While the record establishes that CFs receive a higher hourly wage and "better" benefits than journeyman linemen, it does not indicate the difference in wage rates or provide any details on how the benefits are better. Similarly, provision of a company cellular phone is not limited to CFs, as linemen who are on the call-out list also receive them. Moreover, if CFs are supervisors it would result in improbable supervisory ratio of about two employees for each supervisor.

## **C. Summary of Analysis**

The evidence is insufficient to establish the CFs exercise any of the primary indicia, using independent judgment. Therefore, the Employer has failed to carry its burden to show that CFs are supervisors under Section 2(11) of the Act.

## CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude the Construction Foremen are not supervisors within the meaning of the Act and are eligible to vote and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>29</sup>
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Including all full-time and regular part-time Construction Foremen employed by the employer and working from its principal location at 1564 South 1000 Road, Council Grove, Kansas, or branch location at 414 South Cedar, Hillsboro, Kansas.

Excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

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<sup>29</sup> The parties stipulated to the following commerce facts:

Flint Hills Rural Electric Cooperative Association, Inc., is a State of Kansas Corporation engaged in the distribution and sale of electric service to approximately 6630 electric meters, including construction, operation and maintenance of lines and facilities in connection therewith from its principal location at 1564 South 1000 Road, Council Grove, Kansas, and branch location at 414 South Cedar, Hillsboro, Kansas. During the past year, a representative period, the Employer, in the course and conduct of its business operations, purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Kansas. During that same period, the Employer provided services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial building, educational institutions, or retail concerns. The Employer annually derives gross annual revenues in excess of \$1,000,000.



## **DIRECTION OF ELECTION**

The Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Electrical Workers, Local 304**. If a majority of valid ballots are cast for International Brotherhood of Electrical Workers, Local 304, they will be taken to have indicated the employees' desire to be included in the existing unit of production and maintenance employees currently represented by the Petitioner in Council Grove and Hillsboro, Kansas. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

### **A. Election Details**

The election will be conducted by mail.<sup>30</sup> The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Friday, February 12, 2021**, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, February 19, 2021**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 office at (913) 275-6525.

The ballots will be commingled and counted by the Region 14/Subregion 17 office at 2:00 p.m. CT on **Monday, March 1, 2021**. In order to be valid and counted, the returned ballots must be received by the Region 14/Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be held by videoconference. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **February 4, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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<sup>30</sup> The parties stipulated to the appropriateness of a mail ballot election.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are: 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and, 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional Director and the parties by **February 9, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

The list must be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list must be electronically filed with the Subregion by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

**Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlr.gov](http://www.nlr.gov)), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go**

Flint Hills Rural Electric Cooperative  
Association, Inc.  
Case 14-RC-269760

February 5, 2021

to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

**DATED** at Overland Park, Kansas, this 5<sup>th</sup> day of February 2021.



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William B. Cowen, Acting Regional Director  
National Labor Relations Board  
Region 14/Subregion 17  
8600 Farley Street – Suite 100  
Overland Park, Kansas 66212-4677